Supreme Court, U.S.
F I L E D
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No.
90-1559

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

PAUL J. ERLANDSON, INDIVIDUALLY AND AS INDEPENDENT EXECUTOR OF THE ESTATE OF LORENE E. NEE AND SANDRA VAN DER ES-ERLANDSON

Petitioners

versus

THE INTERNATIONAL BANK OF CORPUS CHRISTI, INDEPENDENT ADMINISTRATOR OF THE ESTATE OF JOHN W. NEE AND JOHN R. NEE, DAVID NEE, MICHAEL G. NEE AND LINDA NEE BECK

Respondents

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT

BRIEF FOR RESPONDENTS

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LIST OF ALL PARTIES

Petitioners:

1. Paul J. Erlandson, Independent Executor of the Estate of Lorene E. Nee, Deceased
2. Paul J. Erlandson, beneficiary of the Estate of Lorene E. Nee
3. Sandra Van der Es-Erlandson, beneficiary of the Estate of Lorene E. Nee

Respondents:

1. The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee
2. John R. Nee, beneficiary of the Estate of John W. Nee
3. David Nee, beneficiary of the Estate of John W. Nee
4. Michael G. Nee, beneficiary of the Estate of John W. Nee
5. Linda Nee Beck, beneficiary of the Estate of John W. Nee

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BRIEF FOR RESPONDENTS

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Your Respondents, The International Bank of Corpus Christi, Independent Administrator of the Estate of John W. Nee, John R. Nee, David Nee, Michael G. Nee, and Linda Nee Beck, who are the parties against whom Petitioners sought relief in the Texas appellate courts respond as follows to the issues in Paul J. Erlandson's petition for writ of certiorari:

I. SUMMARY OF ARGUMENT

The decision below rendered by the Thirteenth Court of Appeals of the State of Texas with the Petitioners' Application for Writ of Error from that Court being denied by the Texas Supreme Court was clearly in accordance with the bodies of laws of the State of Texas appertaining to Texas property laws and probate laws, including the Constitution of the State of Texas, the Texas Statutes and the Common law of the State of Texas. There is no question of any violations of any of the constitutional provisions of the Constitution of the United States or of any Federal laws that justifies the grant of a writ of certiorari here.

II. PERCEIVED MISSTATEMENTS OF FACT AND LAW CONTAINED IN THE PETITIONERS' CONCISE STATEMENT OF THE CASE

1. Misstatement of Facts

In accordance with the admonitions contained in the U.S. Supreme Court Rule

15, Respondents first address some of the more obvious misstatements and misleading implications contained in that part of the Petitioners' brief denominated as "Concise Statement of the Case" (see Petitioner's brief, pp. 29-33).

a. Contrary to the Petitioners' statement on page 29 that John W. Nee "held" 2,000 shares of Briner stock before marriage, the undisputed evidence was that John W. Nee had acquired (not "held") 2,000 shares of Briner stock on January 5, 1964, three years and five months prior to his marriage to Lorene E. Nee.

b. Contrary to the Petitioners' misstatement on page 30 that "the increase in the value of the stock was attributed to John Nee retaining community earnings in Briner Paint and occurred wholly during the marriage of John and Lorene Nee", the findings by the jury, sustained by the Corpus Christi Court of Appeals and the

Texas Supreme Court was that reasonable compensation for John W. Nee from January 3, 1967 to May 31, 1984 was $1,269,890.00 and that his compensation for the same years was $1,269,890.00.

c. Contrary to the Petitioners' misleading implications contained in their statements on page 30 that Petitioners initiated litigation in this cause when Petitioners (Erlandsons) "brought suit under the Texas Declaratory Judgment Act against John's Estate and his children . . .", the uncontroverted facts are as set out in the opinion of the Corpus Christi Court of Appeals, that the Nees first brought a partition suit against the Lorene E. Nee Estate and that the Petitioners' ". . . declaratory judgment action was improper from its inception . . ." (See Corpus Christi Court of Appeals opinion at pp. 68-69 of Petitioners' appendix).

d. Contrary to the Petitioners' erroneous general statement on page 31 of their brief that "the jury found that John W. Nee had no separate interest in the monies" paid under the buy and sell agreement, the jury found that 2,000 shares of the John W. Nee stock (sold to Briner under the buy and sell agreement) were issued to John W. Nee prior to his marriage to Lorene E. Nee (see Court's Charge at page 153 of Petitioners' appendix). Additionally, the Court of Appeals found as a matter of law that 90.91% of the money paid to John W. Nee by Briner for the purchase of the 2,200 shares of stock vested in John W. Nee as his separate assets (See Corpus Christi Court of Appeals opinion, page 26, Petitioners' appendix).

e. Contrary to the Petitioners' statement contained on page 32 of their brief that the Court of Appeals denied the Lorene E. Nee Estate "its separate proper-

ty rights of $71,977.00", the Court of Appeals ruled that as a matter of law that the Lorene E. Nee Estate totally failed to overcome the legal presumption (Texas law) that all property possessed by either husband or wife upon the termination of marriage is presumed to be community property. (See Corpus Christi Court of Appeals opinion, page 52 of Petitioners' appendix)

f. Contrary to the Petitioners' misstatement of fact on page 32 of their brief that the Thirteenth Court of Appeals of Texas denied the Lorene E. Nee Estate her community property interest in the $1,028,522.00 proceeds received for the sale of the 2,200 shares of Briner stock, 2,000 shares of which were the separate property of John W. Nee and 200 of which were the community property of John W. Nee and Lorene E. Nee, the Court of Appeals did in fact award the Lorene E. Nee Estate

its full 4.545% ownership interest in the total proceeds of the sale of the 2,200 shares. John Nee's separate ownership interest in the 2,200 shares was 95.455% (2,000 separately owned shares (90.91%) plus 4.545%, being one-half of 9.09%, the interest attributable to the 200 former community Briner shares). (See Corpus Christi Court of Appeals opinion at page 26 of Petitioners' appendix)

2. Misstatements of Texas Law

a. Contrary to the Petitioners misstatement of Texas law on page 31 of their brief that the jury finding of "deferred compensation"[1] transformed the proceeds of the sale of John W. Nee's separate 2,000 shares of stock owned by him prior to his marriage to Lorene E. Nee into the community assets of John W. Nee and

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1. Disregarded as a meaningless finding by the Court of Appeals.

Lorene E. Nee, Texas law to the contrary as set out in Art. 16, Sec. 15 of the Texas Constitution, dictates that "all property, both real and personal of a spouse owned or claimed before marriage and that acquired afterward by gift, devise, or descent shall be the separate property of that spouse" as does the TEX. FAM.CODE ANN., §5.01.

b. Contrary to the Petitioners' misstatement of law made by the Petitioners on page 31 of their brief that the $1,028,522.00 monies paid pursuant to the buy and sell agreement became community assets on a "deferred compensation" theory, The Court of Appeals correctly ruled as a matter of law that 90.91%[1] of

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1. Attributable to the 2,000 shares owned as separate property by John W. Nee, i.e. 2,000 ÷ 2,200 = 90.91%; 200 shares or 9.09% being community, i.e. 200 ÷ 2,200 = 9.09%; 4.545% Lorene E. Nee's one-half share and 4.545% John W. Nee's one-half share, John Nee's total shares being 95.455%.

the proceeds of the sale of the 2,200 shares of Briner stock were the separate assets of John W. Nee. (See Corpus Christi Court of Appeals opinion at page 26 of Petitioners' appendix)

c. Contrary to the Petitioners' implications set out in page 33 of their brief that the Court of Appeals and the Supreme Court of Texas failed to adhere to Texas appellate law in refusing to grant a rehearing en banc of the Court of Appeals decision, the Court of Appeals at all times relevant to the ruling it handed down denying the Petitioners motion for rehearing en banc was composed of four qualified justices, two more than statutorily required to render that Court's order denying the Petitioners' motion for rehearing.

III. RESPONDENTS' CONCISE STATEMENT OF THE CASE

Because of the numerous misstatements

of fact and law contained in the Petitioners' version of a "Concise Statement of the Case" as set out above, the Respondents respectfully submit their concise statement of the case which is as follows:

John W. Nee went to work for Briner Paint Mfg. Co. in October, 1949, as a chemist. He retired on February 29, 1984. Briner began doing business as a corporation on October 10, 1949.

On January 5, 1964, John W. Nee, a single man, acquired 2,000 shares of Briner Paint Mfg. Co. stock.

Both John Nee and Lorene Nee had prior marriages. Lorene Nee had two children born of her prior marriage, Paul James Erlandson and Sandra van der Es-Erlandson.

John W. Nee had four children by prior marriages, John R. Nee, David Nee,

Michael G. Nee, and Linda Nee Beck.

Subsequent to his marriage to Lorene on June 3, 1967, John purchased one hundred shares of Briner stock on September 30, 1984 and an additional one hundred shares on September 30, 1980.

On April 10, 1984, 51 days before the death of Lorene on May 31, 1984, Briner purchased all of John W. Nee's 2,200 shares, including both his 2,000 separate shares and the 200 community shares. The purchase price for the 2,200 shares was $1,028,522.00, with a downpayment of $257,130.50 and a note in the principal amount of $771,391.50 with 6% interest payable in five equal annual installments in the amount of $183,125.56, the first being due on April 10, 1985, and the last being due April 10, 1989. The Nees on April 10, 1984, deposited the $257,130.50 downpayment in their MBank joint account

number 651-959-8.

John W. Nee's 2,200 separate shares were 90.91% of the total 2,200 shares John Nee sold to Briner, (2,000 ÷ 2,200 = 90.91%), and the 200 community shares were 9.09% of the 2,200 shares (200 ÷ 2,200 = 9.09%). Thus, $233,757.34 of the downpayment was the separate assets of John W. Nee and $23,373.16 was the community assets of John and Lorene Nee.

On April 10, 1984, before the $257,130.50 Briner downpayment was deposited, the balance in the joint account was $125,258.89. After the deposit the balance increased to $382,389.39.

Fifty-one days after John Nee sold the 2,200 shares to Briner, Lorene died on May 31, 1984. As of May 31, 1984, the 6% interest then accumulated on the principal of the $771,391.50 note was $6,467.01 ($46,283.49, one year's interest on prin-

cipal amount of $771,391.50 divided by 51/365). After May 31, 1984, John Nee's ownership of the principal and interest in the note was 95.455% (90.91% separate interest in principal plus 4.545%, one-half of the 9.09% community interest).

The first of five annual installments in the amount of $183,125.56 was due on April 10, 1985. The remaining four installments were due on April 10, 1986, April 10, 1987, April 10, 1988, and April 10, 1989.

Lorene E. Nee devised all of her estate to her two children except for two pieces of jewelry given to Linda Nee.

After John W. Nee died on October 20, 1986, his Will was admitted to probate in County Court at Law Number Three, Nueces County, Texas, Cause No. 28329-3. The International Bank of Corpus Christi was subsequently appointed Administrator With

the Powers of an Independent Executor and replaced John Nee as a party.

This partition suit was filed by John W. Nee on December 19, 1984, the surviving spouse of Lorene E. Nee, against Paul J. Erlandson, the Independent Executor of the Estate of Lorene E. Nee, Deceased, under the authority of TEX.PROB.CODE ANN., Secs. 385, 386, and 387, to partition his separate property and his one-half interest community property from the Estate of Lorene E. Nee; the suit was filed in the County Court at Law No. One, Nueces County, Texas, where the Lorene E. Nee probate proceeding was then pending as cause no. 39042-1.

The case went to trial on October 21, 1987. The jury's verdict was returned on December 8, 1987.

The case was appealed by the Estate of John W. Nee to the Thirteenth Court of Appeals. A Judgment and opinion generally

favorable to the Respondents was handed down on February 1, 1990. (The opinion is set forth in full in the appendix to the Petitioners' brief, pages 5 - 96).

The Supreme Court of the State of Texas denied Petitioners' application for writ of error on November 14, 1990, and their motion for rehearing on January 9, 1991. (See appendix to Petitioners' brief at pp. 141-144).

IV. THE CONTENTS OF THE PETITIONERS BRIEF RAISE NO FEDERAL QUESTIONS

U.S. Supreme Court Rule 14(h)
(Response to Petitioners' brief "Federal Questions Raised" page 34)

The Petitioners never, either at the trial or appellate level in this proceeding, specified any federal questions sought to be reviewed as required by U.S. Supreme Court Rule 14(h). Additionally, neither are any federal questions contained in the records of this proceeding. (See Petitioners' brief, page 34).

The Petitioners' statements of the case concerned with the raising of Federal Questions are contained on pp. 34-36 of their brief. The questions therein set out by the Petitioners relate solely to the Texas Rules of Appellate Procedure and the Texas statutes creating the fourteen Courts of Appeal of the State of Texas. The response the Respondents made to the same allegations that the Petitioners raised in the State Appellate Courts is as follows:

"As the Honorable Supreme Court of Texas is aware, the Court of Appeals for the Thirteenth Judicial District of Texas consists of a chief justice and five associate justices. TEX.GOV'T.CODE ANN., Sec. 22.2216(m)

As the record reflects, the case at Bar was first submitted to a panel consisting of three judges, composed of Justice Utter, presiding (author of its

opinion), Justice Kennedy, and Justice Dorsey. After the oral argument was concluded, Justice Dorsey recused himself from the case leaving two justices (a majority) to decide the case, which they did by Judgment and written opinion dated February 1, 1990 (See Rule 79 TEX.R.APP. P.).

Judge Utter died before ruling on the Erlandsons' motion for rehearing, leaving one Justice (Justice Kennedy) on that panel. However, contrary to the Erlandsons' statement, there remained four qualified justices on the Court to rule on Erlandsons' motion for rehearing, Chief Justice Nye and three associate justices, Justices Kennedy, Seerden, and Benavides. Those four justices (a majority of the six authorized justices) validly overruled the Erlandsons' motion for rehearing as well as the Nees' subsequently filed limited motion for rehearing as authorized by Rule

100(c) TEX.R.APP.P See Rule 90, TEX.R. APP.P. as to the Court's right to publish or not to publish.

The MAPCO and Hayden cases cited by the Erlandsons in support of their untenable position that the ruling by the four justices refusing their application for rehearing was contrary to statutory law and that Rule 79 TEX.R.APP.P. is unconstitutional are not remotely in point. See Hayden vs. Liberty Mutual Fire Insurance Company, 786 S.W.2d 260 (Tex. Sup.) (Feb. 28, 1990) and MAPCO vs. Forrest, 795 S.W.2d 700 (Tex. Sup.) (March 7, 1990). Both the Hayden and MAPCO cases were before the Ninth Court of Appeals of Texas, which is statutorily composed of only three Judges. TEX.GOV'T.CODE ANN., §22.216(i). In the Ninth Court's cases Judge Dies, after hearing oral argument, resigned before the cases were decided, leaving the decisions of both of the cases

to two judges, one of whom dissented, leaving only one Justice who then solely decided the cases. Obviously one judge is not a majority of three; hence the impossibility of the Ninth Court's complying with the dictates of Rule 79(b), TEX.R. APP.P. requiring a decision by two judges assigned to a panel or by a majority of the Court sitting en banc.

In the case at bar, the opinion of the Texas Thirteenth Court of Appeals (Corpus Christi) was approved by a majority of the three Justice panel assigned to hear the case. It was only after the judgment and the opinion in this cause were approved by the two Justices on the panel (Utter and Kennedy), that the three Judge panel was reduced to only one Justice (Kennedy) upon the death of Judge Utter. There then remained four sitting Justices on the Thirteenth Court of Appeals who remained available after the

death of Justice Utter and the recusal of Justice Dorsey (see Sec. 2.223 TEX. GOV'T.CODE ANN., Rule 79(b) TEX.R.APP.P.) to act on both the Erlandsons' motion for rehearing, as well as the Nees' subsequently filed motion for partial rehearing, such justices being Chief Justice Nye and associate Justices Kennedy, Seerden and Benavides.

The Erlandsons cite no authority to buttress their constitutional arguments. They cite Art. I Sec. 15 and Sec. 13 of the TEX.CONST., neither of which is authority for their contentions. The Erlandsons had a nine week jury trial in open Court. None of their rights have been abrogated in this Appellate process."

V. ARGUMENT

It is respectfully submitted that the Petitioners have wholly failed to sustain their burden of establishing under U.S.

Supreme Court Rule 10 that there are any special and important reasons why a writ of certiorari should be granted. The Texas State Court's decision below did not involve an important question of federal law which has not been, but should be, settled by this Court; nor did the opinion of the Thirteenth Court of Appeals of the State of Texas (writ denied by the Supreme Court of the State of Texas), the Court of last resort in the State of Texas, decide a federal question in a way that conflicts with the decision of another State Court of last resort or of a United States Court of Appeals; nor has the State Court of last resort of the State of Texas decided a federal question in a way that conflicts with any applicable decision of the Supreme Court of the United States of America.

The Thirteenth Court of Appeals of the State of Texas and the Texas Supreme

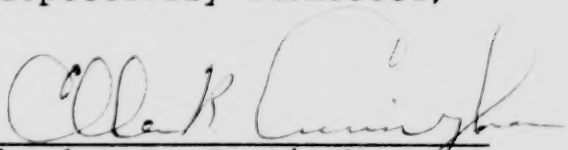
Court correctly decided this State cause under Texas law which in no way conflicts with any provisions of the Constitution of the United States or with any Federal statutes or Federal laws.

VI. CONCLUSION

The Petitioners' petition for writ of certiorari should be denied.

IT IS SO MOVED.

Respectfully submitted,



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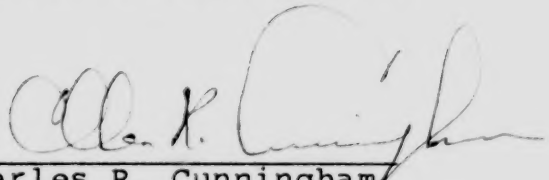
CERTIFICATE OF SERVICE

I, Charles R. Cunningham, certify that on this the 3 day of May, 1991, a true and correct copy of the foregoing was mailed to Counsel for Petitioners, William H. Berry, Jr. and Gail D.C. Dorn at Post Office Box 23063, Corpus Christi, Texas 78403.



Charles R. Cunningham